No. 3007.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The Western Union Telegraph Company, a Corporation,
Plaintiff in Error,
vs.
William Lange, Jr., and J. U. Hastings,
Defendants in Error.
and
William Lange, Jr., and J. U. Hastings,
Plaintiffs in Error,
vs.
The Western Union Telegraph Company, a Corporation,
Defendant in Error.

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STATEMENT OF THE CASE.

This case is before the court on writs or error sued out, respectively, by plaintiffs and defendant below,

who are herein referred to by their several original designations. Judgment was rendered in favor of plaintiffs for the principal amount of their demand, to-wit, $11,250, and defendant now seeks a reversal of that judgment. With great deference to counsel for defendant, we are impelled, by a divergence of view—natural as between opposing advocates—respecting the salient features of the case, to restate the facts as they appear from plaintiffs' standpoint.

The action was brought to recover a loss suffered through defendant's delay, for three days, in the transmission and delivery of a telegram sent by plaintiffs from Oakland, California, to Lyon County Bank at Yerington, Nevada. This telegram was sent under a *special contract* by which defendant, *for an extra toll,* INSURED its immediate transmission and delivery. [Findings X, XII, Tr. pp. 52-53, 56.] By it plaintiff sought to intercept and prevent the payment of a draft in the sum of $11,250 which had been previously mailed by them to said bank, for the purpose of meeting the second of certain seven installment payments under a contract, then in force between themselves and Messrs. Pitt and Campbell, for the purchase by plaintiffs of certain mining stock. [Findings VII-VIII, Tr. pp. 47-52.] That contract provided for an initial payment, which was made upon the execution thereof, and for the deposit in escrow with said bank of the stock in question under escrow instructions therein stipulated for. [Finding IV, Tr. pp. 43-46.] The deposit was accordingly made and the stock was thereafter held by the bank "in accordance with said contract and subject to such disposition as was required

by said contract on the happening of any of the contingencies therein provided for." [Findinig V, Tr. pp. 46-47.] The contract provided for deferred installment payments at sixty day intervals on account of the purchase price of said stock—the first of which was to be made on or before May 1st, 1907—and further provided (as plaintiffs contend) that default in any payment should *automatically* effect the return of the stock by the bank to Pitt and Campbell, the forfeiture of all moneys previously paid by plaintiffs, and the termination "of *all rights* of EACH of the parties" thereunder. [See clause "Third" thereof, Tr. pp. 45-46.]

The contract required payments to be made at the bank *in gold coin,*—the bank being thereby constituted the agent of Pitt and Campbell "for the purpose of receiving any and all payments to be made *hereunder.*" [Tr. p. 45.] Immediately after the execution of the contract, plaintiffs arranged with the bank that it should pay *in gold coin,* to Pitt and Campbell pursuant to the terms of the contract, the amount of any drafts they might send it. [Finding VI, Tr. p. 47.]

On April 27th, 1907, plaintiffs sent from Oakland, California, by registered mail, to the bank at Yerington, Nevada, a bank draft on San Francisco in the sum of $11,250, payable to the bank. This draft was sent for the purpose of meeting the May 1st payment under the Pitt and Campbell contract, and was received by the bank in due course of mail on April 30th, between 8:30 and 9 o'clock a. m. [Finding VII, Tr. pp. 47-48.] Thereafter, on that day the bank, pursuant to its arrangement with plaintiffs, paid over

the amount thereof *in gold coin* to Pitt and Campbell, and later collected the amount of the draft from the drawee thereof.

On the afternoon of April 29th, the day before the amount of the draft was paid by the bank to Pitt and Campbell, plaintiffs were advised by the engineers who had examined the mine at their instance, that the property was valueless, and they thereupon determined to abandon the Pitt and Campbell contract and to notify the bank not to pay any sum on the draft already sent. To that end, on that same evening they offered to defendants at Oakland, for immediate telegraphic transmission and delivery to the bank at Yerington, the following message: "Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows."

At the time they stated to defendant's agent "that it was absolutely necessary that said message be delivered to said bank * * * before banking hours on the following morning * * * and desired to know of said agent in what manner the said plaintiffs could be absolutely assured that said message would be so delivered." They explained the whole situation with regard to the subject matter of the message, including the extreme need for promptness, the terms of the Pitt and Campbell contract, and the amount of the loss that would be incurred if the message failed of such prompt delivery. They further stated to him the facts regarding the mailing of the draft, the time at which it would be delivered to the bank in due course of mail, and their information that the stock was valueless. They advised him that they had de-

termined to make no further payments, and that the purpose of the message was to intercept payment by the bank of the amount of the draft as hereinbefore mentioned. Plaintiffs also stated that unless the telegram was transmitted and delivered before banking hours of the following morning, the bank would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event said amount would be wholly lost to themselves, since they purposed not to proceed under the contract.

Plaintiffs placed themselves wholly in defendant's hands as regards the steps to be taken in employing the latter's instrumentalities for their purpose, stating to its operator that they desired to be advised how the immediate transmission and delivery of their message might be insured or guaranteed. The operator represented to plaintiffs that defendant would INSURE the immediate delivery of said message if plaintiffs would pay defendant the sum of $1.45, which was *in excess* of defendant's *ordinary* tolls. Thereupon, plaintiffs accepted this proposal, delivered the message in writing to defendant, and paid it the sum mentioned. The operator received such payment, wrote upon the message the words "Deliver immediately," and simultaneously accepted said message on the terms indicated, and INSURED to plaintiffs such immediate transmission and delivery. [Finding VIII, Tr. pp. 48-52.]

Defendant did not, at the time, inform plaintiffs that its lines extended only to Wabuska, or that beyond that point the message would have to be transmitted over a connecting telephone line. [Finding IX, Tr. p. 52.] The court found that the charge paid by

plaintiffs "was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant immediately to transmit and immediately to deliver said message in *such manner* and under *such classification* as, *pursuant to the rules and regulations of defendant,* was required in order that defendant would *insure* to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank." [Finding X, Tr. p. 53.]

Nevertheless, said message was not repeated by defendant in the manner provided in the stipulations on the message blank. [Finding XII, Tr. p. 56.] Defendant did not promptly transmit said message to Wabuska, its terminus, on the evening of April 29th, nor did it promptly deliver the same to the Yerington Electric Company (which operated the connecting telephone line), for further transmission by telephone to Yerington, but, on the contrary, wholly failed to transmit said message to Wabuska and to deliver it to Yerington Electric Company until May 2nd. This delay occurred wholly on the lines of the telegraph of defendant. [Finding XV, Tr. p. 58.]

If defendant had, with reasonable promptness, transmitted and delivered said message to the bank, the same would have reached the bank before it had received the draft; and if the bank had received the message before receiving the draft, it would not have paid any amount thereon. However, the bank, as above stated, received the draft between 8:30 and 9 o'clock a. m. on April 30th, and thereafter on that day paid the amount thereof *in gold coin* to Pitt and Campbell, without any knowledge of plaintiffs' desire to

withhold payment. [Finding XVI, Tr. pp. 59-60.] Plaintiffs did not make any further payment on the contract, but abandoned the same and forfeited all moneys paid thereon. [Finding XVII, Tr. p. 60.]

On April 29th, 1907, and at all times thereafter, said mining stock was practically valueless. [Finding XVIII, Tr. p. 60.] By reason of what the court found to be "defendant's *gross negligence*" in delaying the transmission and delivery of said message until May 2nd [Finding XVI, Tr. p. 59], plaintiffs suffered a loss in the amount of the draft [Finding XX, Tr. p. 61]; and, after making written claim therefor within sixty days, as required by the stipulation on the message blank [Finding XIX, Tr. pp. 60-61, brought this action to recover the same.

From Wabuska to Yerington, a distance of eleven miles [Finding XIV, Tr. p. 58], the only means for the electrical transmission of messages was the telephone line of the Yerington Electric Company. This company and defendant had an arrangement for the interchange of business, each charging its own tolls on a message sent over both lines. Each company employed the railroad agent at Wabuska to handle its business and each maintained its office there in the railway station, the telegraph and telephone instruments being within a few feet of each other. [Finding XIII, Tr. pp. 56-58.]

The Scope of the Inquiry on Defendant's Writ of Error.

At the close of the evidence, defendant made no request "for a ruling thereon," nor a "motion for judg-

ment," nor any "motion to present to the court the issue of law so involved." (*Pennsylvania Casualty Co. v. Whiteway,* 210 Fed. 782, 784.) Therefore, under sections 649, 700 and 1011 of the Revised Statutes, this Court will not inquire into the sufficiency of the evidence to support the special findings or judgment. (*Mercantile Trust Co. v. Wood,* 60 Fed. 346, 348; *Citizens Bank v. Farwell,* 63 Fed. 117; *Wear v. Imperial Window Glass Co.,* 224 Fed. 60, 62-63; *Maryland etc. Co. v. Orchard Land & Timber Co.,* 240 Fed. 364.)

We do not understand that counsel seek to have this court review the evidence herein to determine whether it is sufficient to sustain the findings; but even if such evidence be reviewable, the only questions of fact in dispute between the parties were decided adversely to defendant upon conflicting evidence, and therefore, under the familiar rule, the court will not in any event interfere with the findings. Accordingly, the present inquiry is confined to the question whether the findings support the judgment, and to a determination of the correctness of such rulings on the admission or exclusion of evidence as were excepted to.

With respect to such rulings, no argument is submitted by counsel, and we assume that they have abandoned these specifications of error. However, a sufficient answer to any point that may be made respecting the admission of evidence, appears under subdivision "V" of this brief, *infra.*

BRIEF OF THE ARGUMENT.

Points of Law and Fact.

Plaintiffs' recovery herein is dependent either (a) upon their right under the forfeiture clause of the Pitt and Campbell contract, to default in the payment of any of the deferred installments and thereby terminate their liability for future payments; or, failing such right, (b) upon the election of Pitt and Campbell under such forfeiture clause to take back their stock and thereby forfeit plaintiffs' prior payments thereon. Incidental to plaintiffs' right to recover, is their contention (c) that the mailing of the draft by them to Lyon County Bank did not constitute a payment to Pitt and Campbell under the terms of the contract. And lastly, assuming that plaintiffs sustain the foregoing propositions, they must further maintain (d) that the stipulations on the telegraph blank do not operate to relieve defendant from liability for its negligence. Accordingly, the following points on behalf of plaintiffs are made herein, to-wit:

I. The Pitt and Campbell contract left it to plaintiffs' *option* to default in paying the May 1st installment and thereby *to terminate their liability* for future payments.

II. Apart from this question of construction, the finding that plaintiffs made no further payments under the Pitt and Campbell contract but abandoned the same and forfeited all moneys paid thereon, constitutes a finding that Pitt and Campbell exercised their right of elec-

tion (if any) in favor of *declaring a forfeiture* and of taking back their stock.

III. The mere mailing of the *draft* by plaintiffs did not constitute a payment under the Pitt and Campbell contract, wherein its was stipulated that payments should be made *in gold coin.*

IV. The stipulations on the telegraph blank do not, as properly construed, relieve defendant from liability for its negligent delay herein, even if no gross neglect were imputed to it.

(a) The stipulation of non-liability for unrepeated messages applies only to *mistakes* in transmission and to such delays as may be caused by those mistakes. In the case at bar, the message was correctly transmitted and the gist of the action was *delay.*

(b) The stipulation as to the method in which the special insurance of messages may be effected, does not require a written contract of insurance except where *correctness of transmission* is insured, and does not forbid the verbal insurance of *promptness.*

(c) The stipulation of non-liability for messages forwarded over connecting lines does not apply, (1) because it has reference only to connecting *telegraph*—not to telephone—lines; (2) because it comprehends only those *casual* instances in which defendant finds it necessary to forward over a connecting line—not to the case of a *standing agreement* for the forwarding of all messages for a given destination; (3) because it does not inhibit the making of a *special agreement* to deliver beyond defendant's terminus; (4) because it contemplates relieving defendant from liability only

for defaults occurring on the connecting line; and in this case the delay occurred *wholly upon defendant's line.*

V. Plaintiffs put their whole case in defendant's hands and abided by its directions respecting the manner in which the message should be sent under its rules, and defendant cannot escape liability if, in following such directions, plaintiffs failed to comply with some formality required by the telegraph stipulations.

(a) This circumstance renders admissible the testimony of plaintiffs that they were unfamiliar with the telegraph stipulations.

VI. No stipulation on the telegraph blank can relieve defendant from liability for its *gross or willful negligence,* or for bad faith.

VII. The amount of plaintiffs' damage is the value of the draft, with interest from the date of the filing of their claim with defendant.

I.

The Pitt and Campbell Contract Left It to Plaintiffs' Option to Default in Paying the May 1st Installment and Thereby to Terminate Their Liability for Future Payments.

Obviously, if plaintiffs had the right, under their contract with Pitt and Campbell, to withdraw from the transaction and terminate their liability by defaulting in the payment of any installment therein mentioned, defendant's delay in transmitting and delivering the message whereby they sought to exercise this right

and prevent the payment of their draft, caused them to suffer a detriment that they would otherwise have escaped.

Plaintiffs' right of withdrawal depends upon the construction of the Pitt and Campbell contract. The construction of any contract is a matter of determining the intention of the parties thereto; and if, in a contract such as that here presented, the intent is displayed to leave further performance by plaintiffs to their option, there is no rule of law prohibiting the giving effect thereto.

By the contract in question Pitt and Campbell agreed "to sell and deliver," and plaintiffs agreed to "buy, take and receive," the mining stock—not absolutely,—but *"upon the following terms* AND CONDITIONS, to-wit:

"First: The total price or sum to be paid for the said shares of stock is $75,000.00 *in gold coin* * * * payable in the following manner [here are specified the installments with their respective dates of payment];

"Second: It is hereby agreed by [Pitt and Campbell] that immediately upon the payment of [the initial installment], they will deposit in escrow in and with the Lyon County Bank, * * * certificates of stock * * * endorsed *in blank* * * * and representing in the aggregate [the number of shares constituting the subject-matter of the contract], and will thereupon enter into an escrow agreement with [plaintiffs] and said * * * bank, under which said * * * bank shall hold said shares * * *, to be delivered to [plaintiffs] immediately upon the payment by [plaintiffs] of the final payment * * *.

"Third: And it is further agreed that in the event of default by [plaintiffs] in making any of the payments herein provided for, said Lyon County Bank *shall be authorized under the terms of such deposit in escrow,* AND IT IS HEREBY AUTHORIZED, *to deliver all of the shares of stock* so deposited with it pursuant hereto to [Pitt and Campbell], and that all payments theretofore made by [plaintiffs] shall be forfeited to [Pitt and Campbell], *and that thereupon all rights of* EACH *of the said parties hereunder shall* FOREVER CEASE AND DETERMINE."

Considering the terms of this contract as a whole, it is plain that there was no *absolute* sale of the stock, nor any *absolute* obligation on the part of plaintiffs. The certificates were delivered only *in escrow* and were endorsed only *in blank*. By its express terms, on a default in payment there was *automatically* effected *a return of the stock* to Pitt and Campbell. Having preliminarily *elected* (so to speak) to take back their stock on a default by plaintiffs in making payment, Pitt and Campbell were surely never in a position, by making a *different* election, to substitute another contract for the one entered into by plaintiffs. To keep the contract alive and in force so that the rights then existing under it should ripen into an actual sale and transfer of title, plaintiffs were, from time to time, to pay certain installments of the total price named. The results flowing from a default in this regard are *expressly* defined by the contract, and one of those results is stated to be that "ALL *rights of* EACH *of the parties hereunder shall forever cease and determine.*"

That being so, there is no room for construing the provision respecting default as one to be taken advantage of *only by the vendors, at their option;* for the terms employed are contradictory of any such interpretation.

If, in case of default, the vendors had the right to enforce payment of further installments, such right existed only by reason of the contract, *i. e.,* it was *one* of the rights of Pitt and Campbell thereunder. But a default in payment is expressly given the force of causing "*all* of the rights of EACH of the parties," *i. e.,* the rights of Pitt and Campbell as well as those of plaintiffs, to "*forever cease and determine.*" The Court cannot construe *any* right as subsisting in either party after a default in payment, without substituting another contract for the one in question. The effect of a default having been expressed in terms *excluding* any idea that the same would follow *only at the option* of Pitt and Campbell, no terms giving a different effect to such default can be imported or construed into the contract. *Expressum facit cessare tacitum.* To hold otherwise would be to say that though the contract expressly provided for the termination of *all* rights of Pitt and Campbell, yet the only right they could *possibly* have thereafter was none the less still in existence. They had no choice, under their contract with plaintiffs, and under the deposit in escrow, but to take back their stock on any default,—having in such event "*authorized*" its return by the bank to themselves at the very incipiency of the transaction. Surely the law does not countenance a construction so opposed to good

sense as to require, in effect, the striking out from the contract of the provision that, upon default in payment, *"all* rights of *each* of the parties hereunder shall forever cease and determine."

A case precisely in point is that of *Ramsey v. West,* 31 Mo. App. 676. The court there had under consideration the effect of a forfeiture clause in an agreement whereby it was recited that "in consideration of the sum of $20,000, *to be paid* as hereinafter specified, the receipt of $5 of which is hereby acknowledged, the said John S. West *has this day sold* in fee simple to S. C. Schaeffer" certain described lands. "And the said S. C. Schaeffer, for himself and assigns, *agrees,* subject to the *condition* hereinafter named, *to pay* the said sum" in installments therein stipulated. The contract further provided that, on receipt of the first installment, West would deliver to Schaeffer a deed for the premises, and that at the same time Schaeffer would deliver to West notes for the deferred payments, secured by a mortgage. The contract contained the following forfeiture clause:

"It is understood that if the said Schaeffer * * * shall neglect or fail to pay * * * the first payment of $5000.00 on or before the time stipulated, then this agreement to be wholly void and shall *cease to be binding on* EITHER *of the parties hereto."*

Schaeffer having failed to make the first payment, afterwards refused to carry out the contract and complete the purchase. The lower court held that he was obligated to purchase the land and that the forfeiture

clause was one that could be invoked or not solely at the election of West. In reversing this judgment the appellate court said:

> "The condition of the contract with which it concludes *in express words is made for the benefit of both the parties thereto.* While the principle invoked by the plaintiff's counsel, 'it is a far-reaching principle of common law that a party shall not be allowed to take advantage of his own wrong, and courts will not so construe the contract as to enable the party committing the wrong to take advantage of it,' is a sound principle and firmly established, it has no application to a contract *whose language gives no reason for construction, and is susceptible of only one meaning,* and that meaning is that the party failing to comply with one of the terms of the contract may, as well as the other party, on the happening of the failure, elect to put an end to the contract. Because, although the principle of construction should be given full force, *it cannot authorize the court to make a new and distinct and different contract for the parties.* The contract in this case clearly provides that Schaeffer, upon failing to pay or tender the first payment provided for thereby, might elect to treat the contract as at an end, for the words are, 'then this agreement to be wholly void, *and shall cease to be binding on either of the parties hereto.*' On no ground can we refuse to give the force, effect, and meaning to these words which they plainly intend."
>
> 31 Mo. App. 684.

On rehearing the court cites the case of *Bradford v. Limpus,* 10 Ia. 35, in support of its conclusion that the

contract was an optional one, and says of the same line of authorities cited by counsel for defendant herein (including *Wilcoxson v. Stitt,* 65 Cal. 596, and *Mason v. Caldwell,* 5 Gilm. 196) that "they do not apply to this contract. * * * If the words used in the contract do not convey the meaning given them by us, *it would be difficult to conceive words that would do so."*

It will be noted that in this case the contract recited that the vendor *"has* this day *sold"* for a purchase price *"to be paid,"* and that the vendee *"agrees to pay,"* and to execute and deliver notes for the deferred installments at the time of the first payment. In the case at bar we have an agreement by Pitt and Campbell to "sell and deliver," and an agreement by plaintiff "to buy, take and receive,"—but these agreements are both explicitly declared to be "upon CONDITIONS." Hence the idea of an *absolute* obligation on the part of plaintiffs to purchase is expressly negatived,—and particularly so when we consider the peculiar terms authorizing the depositary in escrow to return the stock and the unambiguous wording of the forfeiture clause.

A circumstance lending weight to this view is that at no point in the contract do plaintiffs *explicitly agree to pay* anything. The price "to be paid" is recited, but the only further recital is that it "shall be payable" in installments. While the absence of an express promise to pay might not relieve the vendee of his obligation to purchase if there were no forfeiture clause such as is here under consideration, nevertheless that absence is cumulative evidence of an intent to make the forfeiture clause available to both of the parties to the contract.

See, also, *Becwith-Anderson Land Co. v. Allison,* 26 Cal. App. 473, where a contract for the sale of land provided that the vendee should make payment of a cash installment when the agreement was executed, of a further sum on the delivery of the deed, and of the balance in three annual installments. The contract further provided that upon the failure of the vendee to pay the first installment, the vendor should be released from all obligations to convey, and all rights of the vendee should cease, and the cash payment should be "forfeited as damages for the non-fulfillment of the conditions hereof" by the vendee. The court said that "it was * * * unconditionally provided that upon the failure of [the vendee] to comply with the conditions to be performed by him," the forfeiture should result. "Under such circumstances the proposed purchaser has an *option* to purchase, *without any obligation* beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction." [pp. 475-476.]

In *Verstine v. Yeaney*, 210 Pa. 109, 59 Atl. 689, the court had under consideration a contract by which Yeaney agreed to sell and convey certain land to Stamey & Co. for a price payable one-half in six months from the date of the agreement, the balance in two equal annual installments; "and it is agreed that, in case the said W. H. Stamey & Co. does not make the payment within the limits of the time specified * * * then this agreement to be null and void and *all parties* to be released from *all liability* herein." The court said:

"The agreement is *practically an option,* and was so regarded below. It is true it is an unconditional covenant on the part of Yeaney to convey, and there is *an agreement* on the part of Stamey & Co. *to pay,* but their agreement has attached to it—doubtless at their instance—a *proviso* that, if they do not make the payments at the time stipulated, they are to be *released from all liability.* The agreement in Yerkes v. Richards, 153 Pa. 646, 26 Atl. 221, 34 Am. St. Rep. 721, was substantially the same, and the condition as to failure to make payment similar. We declared it to be an option. Here Stamey & Co. never exercised their option by paying the first installment when it became due, and *by their voluntary default elected to say they would not take the property.*"

59 Atl. 690.

The terminology which the parties employ in their contract,—while of importance in determining the nature thereof,—does not in any case require a violation of the obvious intent with which it was used, even though more apt terms might be suggested for the expression of that intent. For example, see *Pittsburg etc. Brick Co. v. Bailey,* 76 Kan. 42, 90 Pac. 803, where, though a contract was designated a *lease* and contained terms of demise, nevertheless it was by the court regarded as a mere *option* by reason of its containing a clause permitting the so-called lessee to surrender the same; and a further clause to the effect that the failure to complete a certain oil well or to make payment would render the contract void after a lapse of two years. See, also, the case of *McConathy v. Lanham,* 116 Ky. 735, 76 S. W. 535, where the court held to be "a mere

option" an agreement by landowners to sell which contained a clause to the effect that if the consideration was not paid within the time stipulated "this contract shall be null and void."

A case closely in point is that of *Williamson v. Hill,* 154 Mass. 117, 27 N. E. 1008. We quote the syllabus in the latter report, as follows:

> "Plaintiff sold defendant certain patent rights in consideration of annual payments which were to aggregate $250,000, upon condition that should any such annual payment become due, and should default in payment be made sixty days after demand, the contract should be null and void. It was stipulated that a single payment of $100,000 might be made in lieu of the annual payments, and that defendant might assign his rights under the contract, the same conditions to be binding on the assignee. *Held,* that the contract was terminable for the benefit of defendant as well as of plaintiff, and, where default has been made in payment, it cannot be recovered by suit, as the contract is then avoided for all purposes."

In the case at bar, the clause *"all rights of* EACH of the parties hereunder shall forever cease and determine," can only mean the rights of the vendors as well as of the purchasers. To give it any other meaning, requires the Court to read *out* of the contract the words "*each* of the parties" and to read *into* it the wholly contradictory expression, "the parties of the *second* part" [plaintiffs]. The present is a much stronger case in this regard than *Williamson v. Hill, supra,* and is not distinguishable from *Ramsey v. West,*

supra, nor, on principle, from *Gordon v. Swan,* 43 Cal. 564, *q. v.*

It is clear, therefore, that no absolute sale of the stock was made. By the contract's own terms, the sale and purchase were declared to be "upon * * * *conditions";* and one of those "conditions" was that, upon default by plaintiffs in paying any installment, "*all* rights of EACH of said parties hereunder shall forever cease and determine." It is impossible to suggest language that would point more unmistakably to the intention that, upon default, there should be effected *automatically*—that is, by the *terms* of the contract *itself,* and not by the *election* of the vendors,—what was, in effect, a wiping out of "*all* rights" secured to "*each* of the parties" thereto. In precise phrase the contract defined the sole rights existing in case of default and the very steps to be then taken by the depositary in escrow, and expressly declared the non-existence of any other rights whatever.

A forfeiture is not favored by the law; and a forfeiture that can be invoked or not, according to the election of only one of the parties to a contract, should meet with especial disfavor, since it gives that party the further advantage (beyond such as is accorded by a simple forfeiture) of an election on his part to enforce either further performance or the forfeiture—accordingly as the one or the other may seem, at the time, to be the more profitable to him and, therefore, the more onerous on the other party. But where the forfeiture provided for is, in a manner of speaking, *compensated for* by having annexed to it the effect of

wiping out all further rights and liabilities under the contract, there is less reason for viewing it askance. In other words, the party forfeiting gets some value for the money forfeited; whereas in the case of a forfeiture that may be exacted at the election of the other party, either the forfeiture is invoked (in which event he loses his money), or the performance of the contract is enforced (in which event he may stand to lose more),—and this without his being able, in most cases, to foresee what will be the result of his defaulting.

A purchaser may very well prefer to lose what he has already paid on a contract rather than go on under it; and it is certain that he will always, if possible, so draft his contract that default in payment will terminate further liability. The law itself works the forfeiture of the money already paid on a contract such as that now under discussion, even in the absence of the express provision therefor. (*Glock v. Howard etc. Co.,* 123 Cal. 1.) On the other hand, the vendor will always, if possible, so draft the contract as to give him the election either to enforce a forfeiture or to compel a performance. Without a word in the contract on the subject, the law would give him this election. (*Id.*) Therefore, when the parties insert a provision as to forfeiture and the termination of all rights of *each* of them by the mere fact of defaulting in payment, it is reasonable to suppose that they intended thereby to assent to something different from what the law itself would have read into the contract in the absence of such a provision. The only other possible

intent embraced within the meaning of the words here actually employed is that the forfeiture should be worked *by the terms of the contract itself*—not by the election of the vendor,—the vendor yielding a point that, in the absence of the special stipulation, would have been his, and the purchaser gaining what would otherwise have been denied him. In other words, the forfeiture has some element of mutuality and is, therefore, not so abhorrent as is the ordinary forfeiture for lack of that quality.

The construction here contended for is not only reasonable, but it is the only construction that gives their plain meaning, or any force whatever, to the words "thereupon" (*i. e.,* upon default in payment) "*all* rights of *each* of said parties hereunder shall forever cease and determine." This construction is the only one that would even suggest itself to the layman. Both parties to the contract acted upon it as the only tenable one,—plaintiffs sending their telegram in reliance upon its correctness and explaining to the telegraph company that they had the right to terminate the contract by withholding payment; and Pitt and Campbell taking back their stock (as we shall see) without even suggesting that they had any claim against plaintiffs for the unpaid balance of fifty-five thousand dollars.

If our interpretation be a reasonable one and the only one giving any force to the words declaring that upon default "*all* rights of *each* of said parties hereunder shall forever cease and determine," it must be given to them unless some rule of law forbids or in-

validates stipulations of this nature; and it will hardly be pretended that any such rule exists. That defendant's contention is without merit must be apparent if we but ask ourselves,—"What right of Pitt and Campbell was to cease and determine upon the default *except* it be the right they might otherwise have had *to enforce further payment?*" There could be no other possible right in the vendors; for the contract and the escrow thereunder expressly secured to them the *right* to the return—not to say *actual return,*—of their stock, and the *right* to the forfeiture, and the *actual forfeiture,* of all moneys previously paid. It was their only remaining right—to enforce further payment by plaintiffs,—that the contract expressly declares to be non-existent after a default.

In *2 Warvelle on Vendors,* p. 818, it is said:

> "But forfeitures are not and never have been regarded by the courts with any special favor; and where a party insists upon a forfeiture, he must make clear proof and show that he is entitled to it. It has ever been regarded as a harsh way of terminating contracts, * * *. The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end." * * *

The author, after recognizing cases of the class of *Wilcoxson v. Stitt,* 65 Cal. 596, proceeds as follows:

> "But while forfeiture, as a general rule, is a privilege of the vendor, to be exercised or not at

his option, and the vendee is debarred from treating the contract as rescinded merely by a surrender of possession and a waiver of any further rights in the money previously paid by way of earnest or upon installments, yet the *wording* of the agreement relating to forfeiture may under some circumstances *be construed to create mutual covenants that will extend this privilege to the vendee as well.* Cases of this kind are not difficult to imagine, and the books furnish us with precedents on which to base the rule. Thus, where by the terms of the agreement it is stipulated that upon failure to make payments as agreed, or if such failure continue for a specified time thereafter, all payments theretofore made should be forfeited, and the agreement shall thereafter be null and void, if default occur the contract, by its terms, comes to an end at the time limited. [Citing *Streeper v. Williams,* 48 Pa. St. 450.] A contract so worded has been held to create mutual covenants—the vendee in case of default agreeing to forfeit all moneys previously paid, and the vendor agreeing that thereafter the contract shall cease; or, in other words, in consideration of the vendee's agreement to forfeit the money which he shall have paid, the vendor agrees to accept that in full satisfaction of the agreement, and to release and discharge the vendee from all subsequent liability thereon." [Citing *Neill v. Peale,* 4 Atl. 830, Pa.]

2 *Warvelle on Vendors,* p. 821.

It is submitted that the case at bar is precisely of that class of cases discussed in the foregoing quotation from Warvelle.

The present is not a case wherein ordinary property was the subject-matter of the contract, as in *Wilcoxson*

v. Stitt, supra (city realty); but is one where the investment was of the same hazardous nature as in *Gordon v. Swan, supra* (a mine) and in *Williamson v. Hill, supra* (patent rights), in the latter of which it was said that the purchaser's right under such a contract was to determine, from time to time, whether he would pay an additional installment and thus continue the contract in force for a further period, or whether he would forfeit what he had already paid, forego any rights to the property, and escape further liability.

Here in the West, where mining is one of the chief industries, we are thoroughly familiar with contracts wherein purchases of mines or mining stocks are made under conditions very similar in form to those under discussion. The deeds or certificates are in each instance placed in escrow to await the issue of the transaction. An immediate or early payment of a more or less substantial sum is made, and it is provided that the balance shall be paid in installments at stipulated times. The aggregate of these installments, *i. e.,* the total purchase price, is usually very large, and bears relation rather to the optimistic estimate of the prospect-owner than to the visible worth of the property at the date of the contract. The prospective purchaser is willing to enter into such a contract because he reckons on paying the total price only in case the mine, on development or adequate prospecting, justifies the sanguine expectations of the owner; and he has the interval between any two payments within which to determine, from such current development as may have a bearing on the value of the prospective investment, whether he

will keep alive his option or conditional contract of purchase by paying the next installment. If the mine turns out well, he pays an adequate consideration therefor. If it does not, he defaults in the payment of an installment; his forfeiture compensates for the privilege he has enjoyed; and the property is handed back to the vendor, to whom no injury results, since he not only retains the property he started with (and usually the improvements made by the prospective purchaser) but also all moneys paid on account prior to the default. It is plain, therefore, that there is no unfairness in construing such contracts in the manner here contended for and as the Supreme Court of California construed a similar one in *Gordon v. Swan, supra.* Moreover, to adopt any other construction would be equivalent to prohibiting the investment in most mines of that capital without which their wealth must forever remain unavailable.

We submit, therefore, that plaintiffs had the right, *either* to keep the Pitt and Campbell contract alive by paying the installments from time to time as therein provided, and thereby finally to become absolutely entitled to the stock, *or* to default in payment at any time and thus "forever" terminate "*all* rights of EACH of the parties" to the contract.

Counsel contend that the words of the contract,—"*thereupon* all rights * * * shall cease,"—do not relate to the default in payment, but to the return of the stock. [p. 23.] From this premise they reduce our construction of the contract to the absurdity of denying to Pitt and Campbell, upon plaintiffs' default, even

the right to the return of their stock, for the reason that such right was one that *thereupon* ceased. The difficulty that counsel seek to create in this respect grows out of a failure to differentiate the rights as between plaintiffs and Pitt and Campbell on the one hand, from the distinct rights as between Pitt and Campbell and the bank on the other.

The default in payment gave instant rise to the duty of the bank to return the stock to Pitt and Campbell and contemporaneously forfeited past payments to them. But it is not to be lost sight of that the *bank's* duty in this regard arose *only under the terms of the deposit in escrow*—not under the Pitt and Campbell contract, to which the bank was not a party. True, the latter contract provided precisely what the terms of the escrow should be, and the oral escrow agreement and instructions followed the pertinent provisions thereof. But they were distinct agreements to the later of which only was the bank a party. Therefore, in the use in the Pitt and Campbell contract of the phrase "*thereupon* all rights of each of said parties hereunder shall forever cease and determine,"—we find nothing upon which counsel can base their attempted *reductio ad absurdum.* As between the parties thereto, *i. e.,* plaintiffs and Pitt and Campbell, all rights of *each,*—of the former to purchase and of the latter to sell,—ceased upon and by reason of the contemporaneous default and forfeiture. These were rights *"hereunder."* But the duty of the bank still subsisted under the oral escrow agreement. As depositary in escrow, the bank was the trustee of an express trust invested

with duties the performance of which neither of the parties to the agreement for the deposit could forbid. (*Manning v. Foster,* 49 Wash. 541, 18 L. R. A. (N. S.) 337; *Cannon v. Handley,* 72 Cal. 133.) Moreover, Pitt and Campbell's right to the stock, *i. e.,* their ownership, did not *arise* under the contract, and it still subsisted though that contract was wiped out.

If the adverb "thereupon" refers to the moment of the return of the stock (as counsel argue) rather than to the moment of default in payment, then the adverb "theretofore," used in an identical construction in the phrase "all payments *theretofore* made shall be forfeited," must likewise refer to the moment of such return. This would entail the forfeiture of all moneys that might have come into the bank's hands even after the date on which a default had been made—an intent that cannot be attributed to either of the parties. For example, if plaintiffs made a payment on a day later than that on which it was required to be made under the contract, Pitt and Campbell could then, under counsel's view, elect to take back their stock and forfeit all payments *theretofore* made, *i. e.,* prior to the return of the stock,—thus embracing in the forfeiture the very payment delay in making which constituted the default. Such an inequitable construction could not possibly be sustained, and to avoid it the word "theretofore" would be held to refer to the moment of default. Accordingly, the adverb "thereupon" must be held likewise to refer to the same moment.

In this connection, note that the word "thereupon" does not occur in the phrase providing for the forfeit-

ure of all moneys paid by plaintiffs. If counsel's contention is correct, the right to the forfeiture could only arise upon the physical repossession of the stock by Pitt and Campell. The contract, however, is explicit that a forfeiture occurs upon the mere default, and necessarily the determination of all rights must take place at the same moment, since it is impossible to conceive of the parties agreeing that prior payments shall be forfeited and yet that plaintiffs' liability for future installments shall be kept alive until they actually receive from the bank the physical redelivery of the stock.

The forfeiture clause of the Pitt and Campbell contract is very different in its provisions from what counsel's purported synopsis of it would lead one to expect [p. 22]. According to counsel, the contract provides "that in the event of any default in payment the bank *shall be* authorized to return the stock." If this were true, it might possibly follow that the bank's authority was *to arise in the future* after default had been made, and was to be given by the vendor alone. The points of difference between the actual contract and counsel's synopsis are obvious, and are conclusively in favor of our construction. They are as follows: (a) The authority to return the stock is to be given "under the terms of the deposit in escrow" long *before* a default could possibly occur; (b) as between themselves, the parties to the contract unite in presently conferring that authority in this very instrument *before* even any escrow agreement was entered into; and (c) it is agreed that default in payment shall be the contingency in which that authority shall be *exercised* by

the bank,—not as agent of either party, but as trustee of *both.* In view of these circumstances, how can it be said that *one* of those parties might vary the terms of the trust by forbidding the bank to do what both parties *preliminarily agreed* that the bank had authority to do in event of any default in payment?

Counsel seeks to make some capital out of the fact that "the bank was not *directed* or *compelled* to return the stock * * *; it was only given *authority* to do so" [p. 23]. When one person simply confers authority upon another to do an act for him, of course the principal (except in the case of a power coupled with an interest) can revoke the authority. But a depositary in escrow is not a mere agent; he is the *trustee of an express trust* with duties prescribed in advance by the escrow agreement, to which alone can he have recourse for his sailing instructions. If the two *cestuis que trustent* unite in an agreement that, in a certain event, the depositary "shall be authorized, and he is *hereby authorized,*" to pursue a definite line of conduct, and thereupon make the deposit in escrow under instructions so "authorizing" the depositary, neither *cestui* can revoke those instructions. (16 Cyc. 568.) The very essence of an escrow is that it is "beyond the control of the grantor for all time." (*Id.*) What is thereafter to be done with it depends—not upon the will or election of either of the parties,—but upon the happening of the contingencies provided for in the escrow instructions. A deposit subject to the subsequent instructions of the grantor is no escrow at all. Yet it cannot be doubted but that there existed an escrow in the case at bar.

It will not escape the Court's attention that, at the date of the trial herein, any action on the contract by Pitt and Campbell against these plaintiffs had long since been barred by the statute of limitations. This circumstance bears a double aspect. Not only was it then impossible for Pitt and Campbell to maintain any action thereon, but their permitting the statutory period to run without seeking redress against plaintiffs indicates either an election to take back their stock or complete acquiescence on their part in the construction placed upon the instrument by plaintiffs when they determined to abandon the contract by defaulting in payment. In *Mitau v. Roddan,* 149 Cal. 1, the court found it unnecessary to construe the contract before it, because of the practical construction placed thereon by the parties, "which," said the court, "is *controlling*" and "which renders it immaterial to consider what might be the literal construction of its terms." The court proceeds:

> "It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is *alert to his own interests, and to insistence on his rights,* and that whatever is done by the parties contemporaneously with the execution [*i. e.,* the performance] of the contract is done under its terms as they understood and intended it should be. * * * The law, * * * recognizes the practical construction of a contract as the *best evidence* of what was intended by its provisions. * * * in any subsequent litigation which involves the construction of the contract, [the law] adopts the practical construction of the parties as

the true construction and as the *safest* rule to be applied in the solution of the difficulty."

149 Cal. 14-15.

We do not notice counsel's suggestion, at page 25 of their brief, that the "vendee could not escape obligation to convey by failing to convey," further than to say that a contract which neither party is bound to perform is no contract at all, and that their supposititious case is not analogous to the one at bar. Here the obligation existed on the part of Pitt and Campbell to transfer the stock if plaintiffs elected to pay, and did pay, all of the installments. In fact, the deposit in escrow put this matter beyond the control of the vendors.

(a) *Distinction Between the Forfeiture Clause of the Pitt and Campbell Contract and the Clauses Involved in the Cases Cited by Defendant.*

Counsel cite in this connection only those cases "which provide that upon such default [in payment] all the rights of the parties shall cease or such contract be void and of no effect" [p. 26]. They are of no force herein because they merely enunciate the general rule as to forfeiture clauses, leaving untouched our contention that the terms of the present contract preclude its application.

The fact is that the words,—"all rights of *each* of the parties hereunder *shall forever cease and determine,"*—taken in their context, furnish the very degree of clarity, precision and certainty that the law requires in a forfeiture clause before considering it as

intended for the benefit of both parties to the contract. They indicate *unmistakably* an intent that the clause shall be self-operating; and particularly must this be apparent when it is considered that the earlier portion of the paragraph in which they occur, ordaining the future course of a depositary in escrow, can leave no right of election in either party.

On the other hand, the expression,—"the contract shall be *void,"*—is equivocal, ambiguous, and therefore open to construction. *"Void"* is frequently—nay, almost universally,—held to mean *"voidable";* and when it occurs in a forfeiture clause where the contingency is default in payment, it is always so held in order not to impute to the parties the unusual intent that one of them may take advantage of his own default. The cases cited by counsel are all of this class; and yet they all recognize *that there is no rule of law forbidding parties to so contract that the one defaulting may thereby bring the contract to an end for all purposes, provided apt and unambiguous words be used for that purpose.* The opinion of the lower court herein distinctly states this, and declares that the plaintiffs have employed such apt terms. [Tr. pp. 160-161.]

In the case of *Cape May Real Estate Co. v. Henderson,* 79 Atl. 982 (Pa.), the court, in applying the general rule to the forfeiture clause there in question, says:

> "There is no covenant that the defendant should by his default be released from his obligation to pay, *nor that the rights of the grantor under the contract should cease."*

79 Atl. 983.

The italicized words which the Court failed to find in that case are present in the Pitt and Campbell contract in practical identity. In the clause "thereupon *all* rights of EACH of the parties hereunder shall forever *cease* and determine," there is no lack of precision, no ambiguity, nothing susceptible of construction. The only default mentioned in the contract is default in payment by plaintiffs. Both parties to the contract are separately mentioned in the selfsame paragraph in which this clause occurs. And yet in the face of this, the contract is particular to define the rights that are, upon such default, to cease and determine forever as "*all* rights of *each* of the parties hereunder."

We attach some importance to the expression, "shall *forever cease and determine.*" There is a sense of finality therein that is absent from any such clause as, "the contract shall be *void.*" *"To cease"* is *"to come to an end." "To determine"* carries the idea of cessation a little farther, and means,—*"to reach a set limit or termination; to cease to be; hence, to lose binding force."* A *"limit"* is *"a line, point or boundary beyond which whatever is bounded ceases to extend, avail, operate, etc." "Termination"* is defined as *"a limit in point of time; an end of continuance or duration; close; end."* A *"set"* limit or termination is one *"established by authority or agreement; prescribed; ordained; appointed."* (Standard Dictionary.) The adverb *"forever"* emphasizes this finality. It means *"throughout eternity,"* or in the present context, to be more exact, it means *"thenceforth throughout eternity."* Can a limit or termination of rights be said to be *"set,"*

when it is a future uncertain event, which, if it occurs at all, may then be declared by one of the parties, at his whim, to constitute *no* termination of *his* rights?

The case of *Wilcoxson v. Stitt,* 65 Cal. 596, cited by counsel, is clearly distinguishable. That was a case of an agreement for the sale of land wherein the purchaser paid one-half of the price and agreed to pay the balance by a certain day. It was provided that "in the event of failure to comply with the terms and all the conditions hereof by the [purchaser, the vendor] shall be released from all obligations * * * to convey said property * * * and the [*purchaser*] *shall forfeit* all right thereto, and this agreement shall be *void*"—after which followed a provision whereby the vendor, "on receiving such payments, at the time and in the manner above mentioned," obligated himself to convey. The vendor, on default in payment, sued to recover the balance mentioned. This action was sustained, the Court holding that the provision as to default gave the vendor the opition either to avoid or to enforce the contract.

It will be noted that in the *Wilcoxson case,* the terms of the contract expressly released the vendor, on the purchaser's default, from the obligation to convey and forfeited the latter's right to the property. It was natural, therefore, to read the further provision—that "this agreement shall be *void,*"—in the light of those particular stipulations and to hold that it really meant "*voidable*" by the party whose obligations in the premises were released by the other's default. By so construing the contract, every portion of it would, in

conformity to the elementary rule, be given some effect; whereas, if the clause,—"this agreement shall be void," —were construed literally, the clauses releasing the vendor from the obligation to convey and forfeiting the purchaser's right to compel a conveyance, would be rendered superfluous and of no effect whatever, in that the same ground would have been covered by the clause avoiding the agreement. And it is common learning that the word "void" is frequently used, where the term "voidable" would be the exact expression of the idea it is intended to convey.

The case at bar is much more like the case of *Gordon v. Swan,* 43 Cal. 564, and *Williamson v. Hill,* 154 Mass. 117, 27 N. E. 1008, and is indistinguishable on principle from the cases cited herein in support of plaintiffs' construction, particularly the case of *Ramsey v. West,* 31 Mo. App. 676.

It is plain that the provision as to default in payment was inserted for the very purpose of allowing plaintiffs to withdraw from a hazardous investment at any time, and by so withdrawing, to free themselves from all possibility of loss beyond what they had already paid the vendors. If, by defendant's gross negligence, plaintiffs were hindered from taking advantage of a condition of the Pitt and Campbell contract of which they desired to avail themselves, they are entitled to recover the amount of the benefit they would have obtained if they had not been so hindered. (*Gray on Communications by Telegraph,* Sec. 82.) That benefit was the saving of $11,250, which, as is found, would not have been paid to Pitt and Campbell, but for de-

fendant's failure to deliver the telegram *as specially agreed* in consideration of the payment of an *extra compensation.*

II.

The Finding That Plaintiffs Made No Further Payment Under the Pitt and Campbell Contract, But Abandoned It and Forfeited All Moneys Paid Thereon, Constitutes a Finding That Pitt and Campbell Exercised Their Right of Election (If Any) in Favor of the Forfeiture.

The court found:

"That plaintiffs did not make any further payments on the purchase price of said shares of stock * * * but abandoned said contract with said Pitt and said Campbell and forfeited and lost all moneys paid thereon." [Finding XVII, Tr. p. 60.]

Also:

"that by reason of defendants' gross negligence in failing to transmit and deliver said message immediately * * * plaintiffs suffered damage and loss in the amount of the value of said draft." [Finding XX, Tr. p. 61.]

There is a further finding that if defendant had promptly transmitted and delivered the message the bank would not have paid Pitt and Campbell any sum on the draft. [Finding XVI, Tr. p. 59.] There was evidence in the case which would have sustained a finding that Pitt and Campbell had elected to take back their stock on defendants' default. But apart from

that, if, as a matter of fact, plaintiffs made *no* further payments but *abandoned* the contract and *forfeited* all moneys paid thereon, then Pitt and Campbell must necessarily have elected to take back their stock (assuming they had any option at all). The ultimate fact was the forfeiture; the probative facts were the default in payment and such election to retake the stock, and, of course, the ultimate fact only need be found. Accordingly, although counsel's contention that there was "no evidence that the stock had ever been returned to Pitt and Campbell, or that they had ever demanded its return" [p. 24], cannot be presented on the record herein, it would not be sustainable even if the argument were directed against the sufficiency of the findings.

Surely defendant is controlled herein by what Pitt and Campbell *actually* did—assuming that they had any election,—and not by what they *might* have done, but did not in fact do. When they worked the forfeiture of the moneys already paid, plaintiffs suffered as much by defendants' negligence as though they had had (in conformity to our contention) the absolute right to withdraw from the contract.

Though the fact that the stock *was* returned to Pitt and Campbell, is necessarily involved in the finding of the abandonment and forfeiture, plaintiffs are really not concerned with what happened *as between the bank and the vendors,*—the important points being that further payments were *not* made by them, and that they *abandoned* the contract and suffered a *forfeiture,*—all of which is covered by both evidence and findings.

But if Pitt and Campbell could have elected under the contract either to work a forfeiture or to enforce further payment by plaintiffs, the judgment rendered in plaintiffs' favor is nevertheless proper, in view of defendant's failure to show, as an affirmative defense, that such election in fact was made in favor of the enforcement of payment. In *Vito v. Birkel,* 209 Pa. 206, 58 Atl. 127, it is held that, under the ordinary forfeiture clause, no affirmative election by the vendor to forfeit the contract, upon the vendee's default in payment, is necessary.

III.

The Mere Mailing of the Draft By Plaintiffs Did Not Constitute a Payment Under the Pitt and Campbell Contract, Wherein It Was Stipulated That Payments Should Be Made in Gold Coin.

Counsel contend [p. 37] that, assuming even the Pitt and Campbell contract was one of option, defendant is not liable herein, because it was a continuing offer which was accepted by the mailing of the draft to the bank, the agent of Pitt and Campbell for the purpose of receiving payments; and that this acceptance could not subsequently be withdrawn. On this head, authorities are cited to the effect that when an offer is made by one person, the minds of the parties meet and the contract is concluded when an acceptance thereof is posted to the proposer.

But counsel forget the very elementary proposition that the acceptance of an offer, in order to constitute a contract, must be in the *precise* terms of that offer.

A purported acceptance which injects a new element, is in reality no more than a counter-proposal, which in turn requires acceptance before a contract can be made and which may be withdrawn at any time before such acceptance. Now, in the case at bar, on counsel's theory of a continuing offer that could have been accepted by mail, one of the elements of the offer was "payment *in gold coin at the Lyon County Bank.*" Acceptance of that offer would require the physical production of the *gold itself* at the bank; and granting that payment could have been remitted to the bank by mail or by any other recognized mode of transmission, the thing remitted would have had to be *gold coin,*—not a draft. The sending of the draft would constitute merely a counter-proposal which plaintiffs could withdraw by telegraph prior to its acceptance.

Suppose that, without any prior arrangements with the bank, plaintiffs had, on May 1st, tendered their check, or a draft, or a promissory note, to meet the installment payable that day,—can any one pretend for a moment that the bank would have been under any obligation to accept it and to give plaintiffs an acquittance for the amount thereof as provided in the contract? The bank *might* have done so, but in such event it would, so to speak, have been "on a frolic of its own" and not acting in such capacity as would bind Pitt and Campbell. If it had, in such case, passed the instrument on to the vendors, the latter could have rejected it and refused to recognize the receipt given therefor. If the bank, on the faith of the draft, had paid Pitt

and Campbell in gold, and the draft had then been dishonored, the loss would have been primarily the bank's,—not Pitt and Campbell's.

But the court found that "on the same day, but after the execution of said contract, plaintiffs arranged with said * * * bank * * * to pay the amount" of drafts sent the bank by them *"in gold coin* to said Pitt and said Campbell for plaintiffs, pursuant to the terms of said contract" [Finding VI, Tr. p. 47]; and also that after nine o'clock a. m. of the day on which it received the draft, the bank, "pursuant to its arrangement with plaintiffs * * * *had paid* over the amount thereof *in gold coin"* to Pitt and Campbell, pursuant to the contract, and thereupon forwarded the draft to the drawee thereof for payment. [Finding XVI, Tr. p. 59.] The court found further "that if said bank had received said message before receiving said draft, it would not have * * * paid any amount thereon." [Finding XVI, Tr. p. 59.] The draft itself was payable to the order of the bank. [Finding VII, Tr. p. 47.]

(a) *No Question Arises as to Any Transfer of Property in the Draft at the Moment of Its Deposit in the Mail, or at the Moment of Its Receipt by the Bank.*

From the facts found and above outlined, no question can possibly arise as to any transfer of property in the draft, either at the moment of its deposit in the mail or at the moment of its receipt by the bank. The bank was the agent of plaintiffs for the purpose of advancing the gold thereon, and its possession of the *draft,* with-

out any further act looking toward payment to Pitt and Campbell in the stipulated medium, would be plaintiffs' possession thereof. The result is the same whether we regard the bank's possession to have dated from the mailing of the draft or from its receipt. With respect to its dealings with the draft, the bank was subject to the control of plaintiffs up to the moment that, without notice of plaintiffs' change of design, the *gold coin* had been advanced by it in conformity to its prior arrangement with plaintiffs; and if the telegram in suit had been promptly transmitted to Yerington on the morning of April 30th, the bank would have been advised of such change of design at least an hour and one-half, or possibly two hours, before its actual receipt of the draft,—and therefore before it could have advanced coin thereon or had any dealings therewith.

Accordingly, we pass over counsel's authorities on the subject of property in mailed letters and the agency of the postal department. In doing so, we are not losing sight of the fact that the bank was, by the terms of the Pitt and Campbell contract, constituted their agent for the purpose of receiving payments "to be made *hereunder*"; but the payments to be made "hereunder" were payments *in gold coin* only, and the bank's authority, as such agent, was limited to the receipt of payment in the coin specified.

It is so familiar a rule of law as hardly to call for citation, that a payment to be made in gold coin cannot be made in any other medium.

Ward v. Smith, 7 Wall. 447;
Gilbert v. Garber, 62 Neb. 464, 87 N. W. 179;
Moore v. Pollock, 50 Neb. 900, 70 N. W. 541;
Wilken v. Voss, 120 Ia. 500, 94 N. W. 1123;
Hine v. Steamship Insurance Syndicate, 11 Rep. 777.

An agent to collect or to receive payment has no authority to accept anything in payment but *money* and certainly there is no inhibition upon the right of a principal to designate the *kind* of money that the agent shall accept. And in the event that, in the one case, the agent accepts something else than money, or, in the other case, accepts an unauthorized kind of money, he does so at his own risk and becomes liable to his principal as a result of the acceptance of that risk.

In the case of *National Bank etc. v. American Exchange Bank,* 151 Mo. 320, 74 Am. St. Rep. 527, it is said:

> "The general rule is, that an agent, being authorized to receive money only, has no implied power to receive a check, or anything else except money, in payment, and, if he does so, he assumes the risk of its payment, and becomes liable to his principal for the amount of the check with interest from the date of its receipt by him. *Essex County Nat. Bank v. Bank of Montreal,* 7 Biss. 193."
>
> 74 Am. St. Rep. 532.

A depositary in escrow, as such, is not the agent of either of the parties, but is the *trustee of an express trust upon whom duties devolve, the performance of which neither of those parties can forbid.*

> *Manning v. Foster,* 49 Wash. 541, 18 L. R. A. (N. S.) 337;
>
> *Cannon v. Handley,* 72 Cal. 133.

The authority of a depositary in escrow is limited *by the terms of the deposit.* So far as the Lyon County Bank was concerned, all of the courses open to it were *irrevocably* defined the moment the escrow agreement was entered into and the deposit made thereunder.

It is plain, therefore, that up to the moment of its turning over *gold coin* to Pitt and Campbell, the bank was acting wholly under the agreement whereby the bank was engaged as plaintiffs' agent for the purpose of converting bank paper into gold at Yerington. As such agent, it was under the instructions of its principals. It was within the power of those principals to revoke their prior arrangement with the bank at any time up to the moment of its acting in good faith thereon.

At pages 42 to 48, counsel discuss the sufficiency of the evidence to sustain finding VI [Tr. p. 47], which recites the arrangement of plaintiffs with the bank for the advancement of gold coin on the credit of their draft. For the reason stated at the outset of this brief, the sufficiency of the evidence to sustain the findings is not here reviewable, and we accordingly omit any discussion on this head. If the question were an open one, the most that counsel could possibly make out

would be a case of some trifling conflict. We do not concede even any *real* conflict, but rather some trivial differences in forms of expression. We pass, therefore, to the questions of law arising on the defenses based upon the stipulations on the telegraph blank.

IV.

The Stipulations on the Telegraph Blank Do Not, As Properly Construed, Relieve Defendant From Liability for Its Negligent Delay Herein, Even If No Gross Negligence Were Imputed to It.

(a) *The Stipulation of Non-Liability for Unrepeated Messages Applies Only to Mistakes in Transmission and to Such Delays as May Be Caused by Those Mistakes. In the Case at Bar, the Message Was Correctly Transmitted and the Gist of the Action Was Delay.*

The stipulations appearing on the back of the telegraph blank are set forth in full in Finding XI [Tr. pp. 53-55.] The purpose of the stipulation requiring the repetition of messages is by its own terms declared to be, "to guard against mistakes or *delays*"; and the repetition is thereby defined as a "telegraphing back to the originating office *for comparison*."

The case at bar arises *not* out of a mistake in *transmission,* but out of *delay* in transmission and delivery, whereby the message entrusted to defendant did not reach the addressee for three days, and accordingly failed of its purpose. Now, the only *delay* that could possibly be prevented or lessened by a *repetition and*

comparison of the message, is obviously such a delay as would result from mistake in the transmission of the name or address of the addressee. Repetition itself takes as much time as the original transmission of the message, and if no mistake in the address is thereby discovered and corrected, the very act of repeating tends to delay rather than to expedition. In the case at bar, the message—address and all—was correctly transmitted, and therefore the delay complained of was in no way connected with the failure—even had there been such a failure—to have the message repeated.

A corporation discharging such a public calling as that assumed by a telegraph company, can impose upon its patrons only such regulations as are reasonable; and for a regulation to be reasonable in any sense, its observance must, in the nature of things, tend to effect that at which it is professedly aimed. On this very ground, the stipulation as to repetition has been sometimes upheld (although declared void in many other jurisdictions), as a reasonable regulation relieving the company from liability for *such mistakes in transmission,* and for *such delays in delivery,* as would have been prevented by the repetition. The courts have never permitted a telegraph company to shield itself, behind this stipulation, from liability for *delay* in delivering a telegram, except when repeating the message would have naturally tended to prevent the delay,—and then only when the company was *not* grossly or wilfully negligent.

The moment the company attempts to stretch such a stipulation limiting liability, to cover a case wherein

compliance with its terms would have no conceivable tendency to prevent the default with respect to which exemption is sought,—that moment and to that extent, the stipulation becomes an unreasonable regulation, and, notwithstanding its literal import, the law grants the injured party relief.

A case exactly in point, wherein the views here expressed are fully sustained, is that of *Box v. Postal Tel. Cable Co.,* 165 Fed. 138. The court there says of the stipulation respecting the repetition of messages:

> "The rule is not intended to secure a timely effort to *send* the message, but to make more certain its *accurate transmission.* The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. * * * The message must, of course, be sent *before* it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer *to such mistakes and delays as could be corrected or avoided by repetition and comparison;* otherwise, a delay caused by the conduct of the company in negligently failing to send or attempt to send the message would come within the rule. And it is held that it does not apply where 'no effort was made to put the message on its transit.' *Birney v. N. Y. & W. P. Tel. Co.,* 18 Md. 341, 81 Am. Dec. 607. It is difficult to believe that this stipulation was intended by the parties to be applicable to a case in which *the conduct of the company made it impossible*

for the message to be repeated. We believe it would be wholly unjust and not within the intention of the contracting parties to permit this rule to exonerate the company from liability for a failure which, like the one here charged, would not have been prevented by repeating the message." (Citing numerous authorities.)

165 Fed. 141.

In *Purdom Naval Stores Co. v. Western Union Tel. Co.,* 153 Fed. 327, it was held that the stipulation for non-liability in the case of unrepeated messages was inapplicable where there was an utter failure to deliver the message at all.

In *Postal Tel. Cable Co. v. Nichols,* 159 Fed. 643, the Circuit Court of Appeals for the Ninth Circuit distinguished the Primrose case from the case in hand (which was one of delay in transmission due to a connecting line's wires being down) on the grounds, 1st, that the company was advised of the importance of the message and of the time when it would have to be delivered, and then undertook to transmit and deliver the same after satisfying itself of its ability to do so; and, 2nd, that within ten or fifteen minutes after the filing of the message the company became aware of the interruption in its transmission.

See, also:

Fleischner v. Pacific Postal Tel. Co., 55 Fed. 738, affirmed in 66 Fed. 899;

Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734;

Bryant v. American Tel. Co., 1 Daly 575 (N. Y.);

Birney v. New York etc. Telegraph Co., 18 Md. 341, 359, 81 Am. Dec. 607;

Beatty Lumber Co. v. Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

Cases Cited by Defendant Distinguished.

Of the cases cited by defendant, not one meets the case at bar. They all arose out of *errors* in transmission,—not out of *delay* therein or in delivery. As already explained, the observance of the regulation as to repeating is the only means adapted to the detection and correction of such errors, and to that end it is a reasonable regulation. But in each of the cases cited by learned counsel, the sender of the message preferred to assume the risk of an incorrect transmission rather than pay the additional one-half rate for attaining correctness. In the case at bar, on the contrary, plaintiffs paid an *additional* toll for *immediate* transmission and delivery, and defendant's agent evidenced the agreement in this regard by writing the words "Deliver immediately" on the message.

In *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, the word "bay," in an unrepeated cipher message, was transmitted as "buy," *i. e.*, a superfluous dot was sent or received over the wire. That case, on which defendant chiefly relies, is thus clearly distinguishable, and in *Pacific Postal Tel. Co. v. Fleischner*, 66 Fed. 899, the rule therein laid down was strictly limited in its application to cases of cipher or obscure messages.

The case last cited was before the Circuit Court of Appeals in this very circuit.

In *Western Union Tel. Co. v. Coggin,* 68 Fed. 137, the message was unrepeated, and the court placed its decision on the ground that it did not appear that the message would have been understood by the addressee nor that the telegraph company had been advised what the message was about—a matter that did not appear on its face.

In *Hart v. Western Union Tel. Co.,* 66 Cal. 579 (which case, by the way, has been since disapproved by this court in *Western Union Tel. Co. v. Cook,* 61 Fed. 624), the word "bail" in an unrepeated cipher message was transmitted as "bain,"—again the transmission of a superfluous dot.

In *Coit v. Western Union Tel. Co.,* 130 Cal. 657, the figures "37" in an unrepeated message were transmitted as "27." In that case it was shown that there were atmospheric disturbances along the telegraph line and the symbol for "3"—to-wit, three dots, a dash, and a dot,—was transmitted as two dots, a dash, and two dots, this being the symbol for "2."

Clearly none of the foregoing cases (of *erroneous transmission*) were instances of *"gross"* negligence, and therefore it was proper, under the authorities, to apply to each the stipulation as to repeating.

We cannot conceive what comfort there is for counsel in the case of *Union Construction Co. v. Western Union Tel. Co.,* 163 Cal. 298. That case simply holds

that the stipulation as to repeating does not apply to *delay in delivering* a message already correctly transmitted; and the reasoning by which the court arrives at this conclusion is precisely in line with that by which we have endeavored to sustain our position herein. Moreover, the delay in the case at bar is not shown to have occurred at an intermediate office (which counsel contends would render the stipulation applicable), but on the contrary, if the message did not reach Wabuska, the delay may have occurred through its having been sent to an office which, with reference to Reno, was beyond Wabuska. In fact, we incline to the view the message flew off at a tangent after it left Reno.

We turn now to the stipulation respecting the insurance of messages.

(b) *The Stipulation as to the Method in Which the Special Insurance of Messages May Be Effected, Does Not Require a Written Contract of Insurance Except Where Correctness of Transmission Is Insured.*

From the terms on the back of the telegraph blank, it is apparent that the telegraph company divides messages into three general classes, as follows:

1st. *Unrepeated* messages.

2nd. *Repeated* messages.

3rd. Messages *"specially insured"* against "mistakes *or delays* in transmission *or delivery,"* or against "non-delivery."

Of this last class of messages those in which *"correctness* in transmission" is to be insured, must be

"insured by contract *in writing,"* and for *such* insurance premium must be paid at the rates specified on the blank. [Tr. pp. 54-55.]

The provision as to the necessity of a writing, and that prescribing the premium rates, apply only to messages *correctness* in the transmission of which is insured. The gist of the present action is *delay,*—not mistake. Therefore, there is nothing in the terms printed on the telegraph blank inconsistent with plaintiff's right to effect—as it is found they *did* effect—an insurance of *immediate* transmission and delivery in consideration of the payment of a rate *in excess* of defendant's regular charge for ordinary messages. [Findings VIII, X, XII, Tr. pp. 51-53, 56.] Nor is there anything inconsistent with those terms in the fact that the rate paid by plaintiffs was less than the sum that would have been necessary to meet defendant's premium charge if plaintiffs had been seeking—what they were not seeking—insurance of *correctness* in transmission.

To elaborate: It appears that defendant does insure both *correctness* of transmission, and *prompt* transmission and delivery. To insure *"correctness in transmission,"* defendant specifically requires a "contract in *writing"* and payment of the premium at the rate set forth. Therefore it follows, as a necessary implication, that to insure *prompt* transmission and delivery, any form of contract is sufficient, since there is no special requirement of a writing for this case. And it is to be noted that as no premium rate is specified for this class of insurance, the last sentence of the para-

graph specifying the rates for insurance of *correctness,* —to-wit, "No employee of the company is authorized to *vary* the foregoing,"—has no application whatever to the case at bar.

(c) *The Stipulation of Non-Liability for Messages Forwarded Over Connecting Lines Does Not Apply to the Case at Bar.*

The stipulations on the telegraph blank are to be construed strictly as against the company. Looking at the stipulation as to connecting lines, we find that the company "is hereby made the *agent* of the sender, *without liability,* to forward the message over the lines of any other company when necessary to reach its destination." [Tr. p. 54.] That these terms cannot relieve defendant from liability in the present case is apparent from the following considerations:

(1) The stipulation has reference only to *telegraph* —not to *telephone*—lines. To send a message by telegraph requires special skill and training. This is not so with respect to the telephoning of a message, and, therefore, there is no reason for granting an exemption from liability with respect to forwarding messages by telephone.

(2) The stipulation applies only to those *casual instances* in which the company finds it necessary to forward a given message over other lines, and not to the case of a *standing agreement* or established practice whereunder the company forwards all messages for a given destination over another line selected by it

as the *permanent* instrumentality for that purpose. It would be strange, indeed, to have the sender of a message appoint the company his agent to forward it over a connecting line when, at a previous time, the company had already arranged with that line to transmit all messages offered for transmission to destinations on the connecting line. To *ratify* a *prior* general arrangement and to relieve the company from liability for what may occur thereunder, is one thing; but to *appoint an agent* to forward over a connecting line is a wholly different matter, and contemplates that, subsequent to the appointment, the agent will negotiate with the connecting line for the forwarding.

(3) The stipulation does no inhibit the making of a *special agreement* to deliver beyond the terminus of defendant's lines; and such a special agreement was made in the case at bar.

(4) The stipulation contemplates non-liability only for those defaults *occurring on the connecting line,*—that is, during such portion of the transmission as is beyond the originating company's immediate control. In the case at bar, the delay occurred *wholly on defendant's lines,*—no delivery of the message to the connecting telephone line having been made for three days. [Findings XIII, XV, Tr. pp. 56-57, 58-59.]

On the facts found, it is apparent that the stipulation in question can have no application. Defendant never *exercised its agency* to forward the message in question until May 2nd, and no delay occurred on the connecting telephone line. Plainly the stipulation in

question is intended to relieve defendant from responsibility for the negligence of the connecting line, over which it can have no control. Any other interpretation would render the stipulation itself void as unreasonable. To be in a position to invoke it, defendant *must have forwarded* plaintiffs' message *promptly* and correctly; and to do this it must have transmitted the message immediately to Wabuska and delivered it to Yerington Electric Company. The findings negativing this situation render the stipulation respecting connecting lines wholly inapplicable.

It has been held that where a contract for the interchange of business and the division of tolls thereon is entered into between two telegraph companies, the stipulation on the telegraph blank with respect to non-liability for delays occurring on connecting lines, does not relieve one company from liability for the negligence of the other.

> *Postal Tel. etc. Co. v. Harriss,* 122 S. W. 891 (Tex.).

In *Southwestern Tel. etc. Co. v. Taylor,* 26 Tex. Civ. App. 79, it is held that where there are connecting telephone lines with a common agent at the connecting point, the first line is liable for the negligence of that agent in failing to make the connection between the two lines.

Here, if ever, we have a case wherein is found ample justification for the bitterness of the attack made by the text-writers upon these telegraphic stipulations. Plainly, as Thompson, Gray, and perhaps others point

out, the stipulations as to repeating, insuring, etc., were never *really* intended (however they may be *ostensibly*) to give the public an opportunity of securing by purchase greater speed or care in its telegraphic transactions; but were adopted solely to afford the company a loop-hole through which, under the guise of *limiting* liability, to *escape all* liability for the consequences of every instance of negligent or reckless service.

V.

Plaintiffs Put Their Whole Case in Defendant's Hands and Abided by Its Directions Respecting the Manner in Which the Message Should Be Sent Under Its Rules, and Defendant Cannot Escape Liability If, in Following Such Directions, Plaintiffs Failed to Comply With Some Formality Required by the Telegraph Stipulations.

Under the facts found, counsel's argument on the points based on the stipulations on the telegraph blank, is, for the most part, entirely beside the mark. It is not to be lost sight of that plaintiffs went to the telegraph office; explained to defendant's agent in charge just what their difficulty was and what they desired to do; and, after putting the case fully before him, asked what steps they would have to take "in order to INSURE the immediate delivery" of their message to the addressee. They put themselves wholly on defendant's hands; complied exactly with the instructions given them by the agent; paid all charges

(*including an* EXTRA *fee*) asked of them; and saw defendant's agent write the words "deliver immediately" on the message,—by which words was evidenced precisely what they had agreed and paid *extra* for. [Finding VIII, Tr. pp. 48-52.] It hardly lies in defendant's mouth under these circumstances, not only to assert that the stipulations should be warped from their natural meaning to cover this case (a thing that we have shown to be necessary to make them at all applicable thereto), but, supposing them to be strictly applicable, to invoke them in order to take advantage of the ignorance, incompetence, negligence, or wilful misrepresentation and extortion of its agent.

A telegraph company can do business with the public only through its agents, and on them the public must absolutely rely for information as to the manner in which such business shall be transacted. When the sender of a message states to such an agent just what he wishes to accomplish through the company's public facilities; and, putting himself wholly in the company's hands, asks what steps he must take to effect what he wishes, making no condition or restriction whatever as to cost or charge; and then being advised in this regard, does *exactly* as he is told and in the *precise mode* pointed out to him,—he should, in strict justice, be permitted to rely on the contract thus made even when its formalities do not come within the strict letter of the company's regulations. By the company's act, he is put off his guard and contracts in full confidence that the forms adopted answer to the company's rules. The *onus* of seeing to the ob-

servance thereof is in such case passed to, and accepted by, the company, and its failure in a matter as to which it has special knowledge of the highest character, should be borne by it and not by the sender.

The essence of the employment of the telegraph as a means of communication is speed; and to require the sender to go through the company's regulations to check up and determine the correctness of the representations of the company's agent as to the mode of employing the principal in any particular instance (particularly when a free hand, so to speak, is given the agent by the sender), would be unreasonable in that it would defeat the very purpose of that employment. And when all this had been done by the sender, he would still have to seek—as we have been here compelled to seek—a court's interpretation of those regulations and its determination as to whether he had brought his case precisely within their terms.

In this connection, the oral opinion of the learned trial court, rendered in announcing his decision herein, is illuminative. Judge Van Fleet then said, in part:

"So far as concerns the defense that the company is excused by reason of the failure of the plaintiffs to have the message repeated, assuming that the company could contract against its gross negligence, which I doubt, my view is this: Here are persons going to a telegraph office, unfamiliar, as most of us are, with the exact character of the rules and regulations governing the transmission of telegrams; they hand in a message to the agent, inform him of its importance, and submit to him the question as to what means

shall be adopted to insure the prompt and efficient transmission of that message, and the agent undertakes to inform them as to that method, and they conform to his instructions, and pay such increased toll,—in this instance substantially, if not precisely, what they would have been required to pay for a repeated message, some few cents one way or the other. Now, under such circumstances, it seems to me that it does not lie with the company to say that they are excused because of the mere formal insufficiency of that arrangement, which was suggested by their own agent. I think that the court is entitled to hold that it was in substance and effect a contract for the immediate transmission and the repetition of that message, if that was deemed by its agent the best method of insuring its prompt delivery. In other words, I think that it was in effect a contract of insurance for the immediate delivery of this message. It is true, the agent testified that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay an attention to it.' Certainly, if corporations of this character employ people whose mental and physical makeup is such that important instructions may pass in one ear and out the other, with nothing to interrupt such passage, the responsibility for that defect should not rest upon the patron; it should rest where it belongs, with those who employ the agent; and, therefore, I am unable to sustain that defense." [Tr. pp. 163-164.]

(a) *The Fact That Defendant Undertook to Instruct Plaintiffs How Their Message Should Be Sent Under Its Rules, Renders Admissible Evidence of Their Unfamiliarity With the Telegraph Stipulations.*

The foregoing disposes of the two exceptions reserved by defendant to the admission of evidence at the trial. Briefly, those exceptions were to the rulings of the court in admitting testimony (1) by the plaintiff Lange that he did not read the stipulation on the telegraph blank, and (2) by the plaintiff Hastings that defendant's agent did not call his attention to said stipulations. While, ordinarily, a party dealing with a railroad or telegraph company is bound by the terms of the ticket, bill of lading, or message blank, whether he read the same or not, nevertheless there are numerous exceptions or qualifications to this general rule. Thus in 1 *Elliot on Contracts,* Section 53, it is said:

> "In the first place the nature of transactions may be such that the person accepting the ticket, bill of lading or the like may believe, and justly so, that it contains no terms *other than those already agreed upon* and that it is merely an acknowledgment thereof *not intended to introduce any special terms.* * * * So, ordinarily, when a shipper is given a bill of lading which embodies terms *different* from those *orally* agreed upon, *he is not bound thereby."* (Citing numerous cases.)

VI.

No Stipulation on the Telegraph Blank Can Relieve Defendant From Liability For Its Gross or Wilful Negligence, or For Bad Faith.

The court found that "defendant with * * * *gross* negligence delayed the transmission and delivery" of the message in question until May 2nd, 1907. In view of the state of the record it is unnecessary to to discuss the evidence upon which this finding is predicated, and accordingly we omit all reference to counsel's discussion of that evidence at pages 55 to 60 of their brief.

Apart from the proposition that the stipulations in question do not embrace, nor even profess to touch, a state of facts such as that here presented, there is no authority giving them the force of relieving the company from liability for *gross* or wilful negligence, or for bad faith. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, has gone farther than any other authority in this direction, but it merely applied the stipulation respecting repetition to a case of *mistake* in the transmission of a cipher dispatch. Here was an error that would have been at once detected and corrected by a "repetition and comparison"; and moreover, such a repetition in the case of a cipher message is of the highest importance in order to insure correctness, since the receiving operator has not a sensible and intelligible context to aid him in discovering errors. The *Primrose* message, in addition, came precisely within the terms of a further stipulation exempting the company from liability for errors in cipher or obscure

messages. The negligence there complained of would obviously not have constituted *gross* negligence even if the sending operator had failed to send the correct symbol; and it is common knowledge that the electric current may be so temporarily interrupted by a variety of natural causes beyond human control, as to result in a long dash being transmitted as a dot and a dash—the very error in that case complained of. But, as said before, in the case at bar we are complaining of *delay* —not of error—and therefore the stipulations as to repetition and written insurance do not apply.

But if they would otherwise apply, *three days' delay* in the transmission and delivery of any telegram,—particularly when its importance was *apparent* on its face and was *fully explained to the company,*—is negligence of so gross and inexcusable a kind as to remove the case from within the sphere in which such stipulations are accorded any force of exemption. The ordinarily prudent and reasonable man,—whose suppositítious conduct under circumstances such as those presented in the case under consideration, is always the criterion of the degree of care or negligence displayed,—would infallibly have exercised greater diligence in a matter of such importance. A delay of three days, when the company was *fully advised* of the circumstances that made delivery within ten or eleven hours *absolutely indispensable,* and when it *thereupon undertook for an additional compensation to effect an immediate delivery and evidenced its undertaking in that regard by writing the words "deliver immediately" on the face of the message,*—is

either *gross* or *wilful* negligence,—that is, it amounts to a *wanton disregard* of the rights of plaintiffs.

In *Hendershot v. Western Union Tel. Co.*, 106 Ia. 529, 68 Am. St. Rep. 313, it was held that five hours delay was negligence entitling plaintiff to recover. A delay of ten or twelve hours in transmission, if unexplained, has been held to create the presumption of negligence. See:

> *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192;
> *Western Union Tel. Co. v. Clark*, 25 S. W. 990 (Tex.)

When there are special circumstances, very much less delay will raise the presumption of negligence. In *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540, 31 S. W. 825, a telegram was sent at midnight and was delivered at 9:30 a. m. It should have been delivered at 8:30 a. m., and this unnecessary delay of one hour was held to be negligence.

So, "a special undertaking to deliver without regard to office hours, in consideration of extra payment, renders the company liable for failure to perform."

> *Western Union Tel. Co. v. Perry*, 30 Tex. Civ. App. 243, 70 S. W. 439;
> *Western Union Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 229;
> *Western Union Tel. Co. v. Hill*, 26 S. W. 252 (Tex.)

In view of the special circumstances that were fully disclosed to the company in the case at bar, and of

the special undertaking on its part, in consideration of extra payment, to transmit and deliver immediately, there can be no doubt but that it was *grossly* negligent in not delivering the message very early on the morning of April 30th, 1907, at the latest. The fact is that the telegram could very readily have been delivered a couple of hours before the bank received the draft.

The Civil Code of California, Sec. 2162, requires of a telegraph company *"great care and diligence* in the transmission and delivery of messages." In *Western Union Tel. Co. v. Cook,* 61 Fed. 624, it is held in effect that no stipulation of the telegraph company can be permitted to have the effect of relieving it of its obligation to exercise that degree of care and diligence required of it by the statute. (See also *Union Construction Co. v. Western Union Telegraph Co.,* 163 Cal. 298.) Surely three days' delay is not the exercise of that *"great* diligence" required by the law's express provision. Only a *slight* degree of negligence (if one may differentiate between degrees of negligence) would be an absence of such *"great* care and diligence"; or, to put it in another way, any slight or ordinary lack of care when great care is exacted by express legislative enactment, is *gross* negligence. And there can be, according to all the authorities, no exemption from liability for gross or wilful negligence, or for bad faith. See most of the cases herein cited, and also

Redington v. Pacific Postal Tel. Co., 107 Cal. 317;

United States Tel. Co. v. Gildersleve, 29 Md. 232.

In the case of *Pierson v. Western Union Tel. Co.*, 64 S. E. 577 (N. C.), a night message was filed at 8 p. m. and was delivered between 9 a. m. and 10 a. m. the next day. It could have been delivered about 8 a. m. The addressee resided about 200 yards from the telegraph office. The court said:

> "That this is *gross* negligence is not open to discussion."

VII.

The Amount of Plaintiffs' Damage Is the Value of the Draft, With Interest From the Date of the Filing of Their Claim With Defendant.

In our brief on plaintiffs' writ of error herein, we discuss fully what we conceive to be the measure of damages applicable,—our contention being that the court should have included in the judgment on plaintiffs' favor, interest on the principal amount of their demand from the date of the filing of their claim with defendant, and also that the value of the mining stock is not an element to be taken into consideration in determining the amount of plaintiffs' loss. To that brief we now merely refer for such presentation of those points as we desire to make.

Owing to the length hereof, we do not attempt any recapitulation, contenting ourselves with a reference to our "Brief of the Argument," *supra*. Upon the grounds herein discussed (and disregarding for the moment the question of interest), it is urged that the judgment in favor of plaintiffs should be affirmed.

Respectfully submitted,

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